Message

From: Dykes, Teresa [Dykes.Teresa@epa.gov]
Sent: 3/28/2019 9:21:09 PM
To: Fried, Gregory [Fried.Gregory@epa.gov]; Chapman, Apple [Chapman.Apple@epa.gov]
Subject: FW: Upcoming DC Circuit Argument in "MM2A/OIAI" Litigation (challenge to 2018 Guidance Memorandum concerning reclassification from major source to area source under CAA 112) - Monday, April 1

FYI- I had planned to go over there- but I may just watch on-line.

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From: Jordan, Scott
Sent: Thursday, March 28, 2019 1:43 PM
To: Woods, Clint <woods.clint@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>; Cozzie, David <Cozzie.David@epa.gov>; McLamb, Marguerite <McLamb.Marguerite@epa.gov>; Shrager, Brian <Shrager.Brian@epa.gov>; Mcginn, Kevin <mcginn.kevin@epa.gov>; Sorrels, Larry <Sorrels.Larry@epa.gov>; Chan, Elizabeth <Chan.Elizabeth@epa.gov>; Lamason, Bill <Lamason.Bill@epa.gov>; Torres, Elineth <Torres.Elineth@epa.gov>; Truesdell, Raymond <truesdell.raymond@epa.gov>
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Subject: RE: Upcoming DC Circuit Argument in "MM2A/OIAI" Litigation (challenge to 2018 Guidance Memorandum concerning reclassification from major source to area source under CAA 112) - Monday, April 1

UPDATE: I am informed that the D.C. Circuit now offers live streaming of oral arguments.

Here is the link for information, including a link to the live stream:

https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+RPP+-+Information+Regarding+Live+Audio+Streaming+of+Arguments

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From: Jordan, Scott
Sent: Thursday, March 28, 2019 1:39 PM
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[Note that Bill Wehrum and David Harlow are recused from this litigation.]

[Also, because this case raises cross-cutting issues concerning final agency action and interpretive rule vs legislative rule issues, I am cc'ing all attorneys in case they are interested.]

This email contains information on Monday's D.C. Circuit oral argument in the "Major MACT to Area/Once-In-Always-In" (MM2A/OIAI) litigation (California Communities Against Toxics v. EPA, No 18-1085 (and consolidated cases))

Action Challenged: This case is the consolidated challenges to EPA's January 2018 guidance memorandum entitled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," which is commonly referred to as the "Major MACT to Area" or MM2A memo.

Issues in the Litigation: This case presents two threshold issues and (if the case is not decided on one of the threshold issues) one merits issue:

Threshold Issue 1 – Was the 2018 guidance memorandum final agency action subject to judicial review?

Threshold Issue 2 – Was the 2018 guidance memorandum a legislative rule that was required to be issued through notice-and-comment rulemaking?

Merits Issue – Did EPA correctly read the CAA 112 definitions of "major source" and "area source" as barring EPA from setting a cut-off date after which major sources cannot be reclassified to be area sources?

Parties: Petitioners are the State of California and a coalition of environmental groups (California Communities Against Toxics, Downwinders at Risk, Environmental Defense Fund, Environmental Integrity Project, Hoosier Environmental Council, Louisiana Bucket Brigade, Ohio Citizen Action, Sierra Club, and Texas Environmental Justice Advocacy Services).

Intervenors is support of EPA are Air Permitting Forum, Auto Industry Forum, National Environmental Development Association's Clean Air Project, and Utility Air Regulatory Group.

Amici are American Chemistry Council, American Petroleum Institute, American Wood Council, Chamber of Commerce of the United States of America, Council of Industrial Boiler Owners, and the National Association of Manufacturers.

Oral Argument Information: This case is scheduled to be heard on Monday, April 1, before Judges Rogers, Wilkins and Silberman in Courtroom 31 at the Federal Courthouse at 333 Constitution Ave, NW, Washington, DC 20001. Court begins at 9:30 and this case is second on the calendar. The first case is scheduled for 40 minutes of argument, so (subject to last minute changes, which are always possible) our case will start about 10:00-10:15.

Eric Grant (Deputy AAG for ENRD/DOJ) will be arguing for EPA.

Attorneys who will be presenting argument for the other parties are:
State of California – Kavita Lesser (Deputy AG for California)
Environmental Groups – Sanjay Narayan (EDF)
Industry Intervenors – Shannon Broome (Hunton Andrews Kurth)
Industry Amici will not be presenting argument

Recording Available after Argument: The DC Circuit posts audio recordings of its arguments, often later in the day after the argument is held. Those recordings are at

https://www.cadc.uscourts.gov/recordings/recordings.nsf/

Background: Under CAA 112(a)(1), "major source" is defined as any stationary source that "emits, or has the potential to emit considering controls, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." Under CAA 112(a)(2), "area source" is defined as "any stationary source of hazardous air pollutants that is not a major source." The statutory definitions do not state any cut-off date after which a major source is permanently subject to major source requirements. In 1995, EPA issued a memorandum commonly referred to as the "Once-In-Always-In" memo, in which EPA stated that for purposes of CAA 112, a source could change from "major source" to "area source" status only before the "first compliance date" (the date on which the source first becomes subject to an emission limitation or other substantive regulatory requirement). EPA took the position that any source that was a major source on or after that first compliance date would remain permanently subject to the applicable major source requirements.

In January 2018, EPA issued the MM2A guidance memorandum, which explained that the plain language of the definitions of "major source" and "area source" compels the conclusion that a major source can be reclassified as an area source at any time that it takes an enforceable limit on its potential to emit below the major source thresholds. The MM2A memorandum also withdrew the once-in-always-in policy stated in the 1995 memorandum. The MM2A memorandum also stated that EPA intended to conduct a notice-and-comment rulemaking to implement the plain language reading. That rulemaking process is ongoing, with the proposal package currently at OMB for interagency review.

Summary of Threshold Issues: The two threshold issues present mirror image issues. We argue that the 2018 MM2A memorandum is not final agency action subject to judicial review because, under the Bennet v. Spear test, the memorandum (1) simply communicates EPA's plain language reading of the statutory definitions of "major source" but does not bind states or regulated entities or in any way create rights and obligations , and (2) is not the consummation of the agency decision making process, because the memo simply discusses the reading that EPA intends to apply in future actions, such as the ongoing rulemaking. Petitioners oppose this argument, and make their own argument that the 2018 MM2A memorandum was a legislative rule that was required to go through notice and comment rulemaking. Because it did not, they argue, the court should remand and vacate the memorandum. For further details of these arguments, see EPA brief (attached) at 19-32.

Summary of Merits Issue: On the merits, we argue that the court should uphold our plain language reading of the statutory definitions of "major source" and "area source." In those definitions, Congress did not provide for any cut-off date for when a source's status as a major source became permanently set. Petitioners argue that EPA's reading would undermine the structure, purpose and other provisions in CAA 112. We present our arguments and address the various petitioner arguments in the EPA brief at 32-44, and further state that, if the court concludes that the meaning of the statutory definitions must be considered in light of the structure, purpose and other provisions of CAA 112, then the proper step is to remand the memorandum to the agency to address these issues in the ongoing rulemaking. See EPA brief at 44-45.

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